

NORTHERN CHEYENNE TRIBE - MONTANA

TOBACCO TAX AGREEMENT

The Northern Cheyenne Tribe - Montana Tobacco Tax Agreement ("Agreement") is entered into this ____ day of _____, 2011, by and between the State of Montana ("State"), and the Northern Cheyenne Tribe of the Northern Cheyenne Reservation ("Tribe").

The Northern Cheyenne Tribal Council ("Tribal Council") is the governing body of the Tribe and is authorized by Article IV, Section 1(a) of the Northern Cheyenne Tribe's Constitution to enter into this Agreement on behalf of the Tribe.

The State is authorized pursuant to the State-Tribal Cooperative Agreements Act, Title 18, chapter 11, MCA, to enter into this Agreement.

1. General Purposes of Agreement. The purposes of this Agreement are to minimize legal controversy and possible litigation over the taxation of tobacco within the exterior boundaries of the Northern Cheyenne Reservation ("Reservation"), to prevent the dual taxation of tobacco by both the Tribe and the State, to assist in the enforcement of state and tribal tax laws and collection of state and tribal taxes, and to provide an effective means by which revenues generated by the state and tribal taxes on tobacco products may be administered. In order to accomplish these purposes, the State and the Tribe agree that the same level of taxation shall be imposed on tobacco sales both within and outside the boundaries of the Reservation. For purposes of this Agreement, the term "tobacco" shall mean tobacco and tobacco products as those terms are defined in state law.¹ This section shall be interpreted consistently with the terms and conditions set forth in Section 13 of this Agreement.

¹ These defined terms encompass cigarettes and all other products containing tobacco intended for human

2. Recitals. This Agreement is made by and between the Tribe, acting through its Council, and the State. The parties hereto, having conferred together, desire to collect the tobacco tax on all tobacco or tobacco products sold or consumed on the Reservation for the mutual benefit of all the people of Montana including members of the Tribe. The parties agree that, for purposes of this Agreement, the State shall be responsible for enforcing state tobacco tax laws related to non-Indians and non-members and the Tribe shall be responsible for enforcing tribal tobacco tax laws related to Northern Cheyenne tribal members. The parties also agree that they will fully enforce their respective tobacco tax laws.

3. Tribal Law. While this Agreement is in effect, the Tribe shall adopt and keep in force an ordinance imposing taxes equal to the Montana taxes on tobacco, which taxes shall apply to tobacco sold to all persons within the Tribe's jurisdiction on the Reservation in a manner similar to the Montana taxes. The Tribe shall supply the State with a current copy of the ordinance as it may be amended from time to time within 60 days of the enactment or amendment of the ordinance.

4. State Law. The State imposes a tax on tobacco distributed within the State's jurisdiction under Title 16, chapter 11 ("Taxation of Tobacco Products"), Montana Code Annotated. The State shall notify the Tribe in writing of any changes or amendments to state law, which the State believes necessitates an amendment to tribal law under this Agreement within 60 days of any amendment to applicable state law.

5. Collection and Administration of Taxes. The State and Tribe agree that tobacco sold on the Reservation shall not be subject to both the state and the tribal tax, but shall be subject to one tax. The State agrees to assist the Tribe by pre-collecting

consumption or use.

tobacco taxes for sales on the Reservation from the tobacco wholesalers distributing tobacco products on the Reservation and to remit to the Tribe the tribal tobacco tax collected as determined by the formulas described below. All cigarettes sold on the Reservation shall have the state tax insignia affixed (and the Tribe shall not be required to affix a tribal tax insignia) and all other tobacco products shall be taxed.

a. For each calendar quarter, the Tribe shall receive an amount of tobacco taxes pre-collected for tobacco sales on the Reservation, which approximates the sales to enrolled Northern Cheyenne tribal members living on the Reservation. The amount of tobacco taxes that the Tribe receives shall be determined by multiplying 150 percent of the Montana per capita tobacco tax collected for the calendar quarter, times the total number of all enrolled Northern Cheyenne tribal members living on the Reservation.

Subject to the provisions below, the Tribe, through affidavit (in the form attached hereto as Exhibit A) of the Director ("Tribal Enrollment Director") of the Tribe's Enrollment office ("Tribal Enrollment Office") established by the Tribal Council, shall certify to the State by August 15, 2011 and by March 31 of each subsequent calendar year during the term of this Agreement the number of all enrolled members of the Tribe physically then residing within the Reservation's boundaries ("Total Resident Enrollment"). As shown in Exhibit B attached hereto, the Total Resident Enrollment for 2011 is 4,862. The Total Resident Enrollment shall be determined by using the Tribe's then current enrollment list, the most recent voting list for Tribal elections (which list is a partial list because it includes only adult tribal members), and other written sources as appropriate. Enrolled tribal members physically residing on the Reservation who have off-Reservation mail addresses (e.g., in Ashland, Montana) shall be included in the "Total Resident Enrollment." In the event the Tribal Enrollment Director does not issue a certification by

March 31 of any year subsequent to 2011, the State will use the previous year's number, unless evidence exists to demonstrate that the certified number has decreased or increased. In such case, the parties shall meet and negotiate the certified number before July 1 of such calendar year, utilizing the best evidence available. The Council authorizes the State to review and verify the enrollment records, voting records, and other records as appropriate that are maintained by the Tribe, and any other information the Tribe uses, should the State wish to verify the Total Resident Enrollment for the calendar year. If there is a dispute between the State and the Tribe regarding the proper actual Total Resident Enrollment for any year, the Tribe and the State shall have 30 days to resolve the issue by agreement. If the issue is not so resolved within 30 days, the State may use the Total Resident Enrollment figure used for the prior calendar year until a revised Total Resident Enrollment figure is agreed on by both Parties. Any such adjustment to the Total Resident Enrollment figure shall be retroactively applied from January 1st of the current calendar year and, to account for the adjustment, a one-time payment adjustment will be made in the payment due for the next full calendar quarter payment.

b. The State shall distribute the monies due to the Tribe under this Agreement no later than 30 days from the end of each calendar quarter. The State will include with each distribution a statement showing how the distribution was determined for that quarter. Distributions shall continue until the expiration or termination of this Agreement as provided below or required by law. For the purposes of this Agreement, a calendar quarter begins on January 1, April 1, July 1, and October 1 of each year.

c. In the event of termination by either party prior to the end of the term, the State shall remit the full amount payable to the Tribe provided for in this Agreement for

that period of time up to and including the effective date of the termination. This obligation of the State shall survive any termination of this Agreement.

6. Term. This Agreement shall be for a term of ten years, subject to the conditions precedent and the renewal provision below.

7. Audits. Either party has the right to request a third-party audit at its expense of the revenue collection and allocation records to determine the accuracy of the statements or representations called for in this Agreement for the five years immediately preceding the date of the request. The right of a third-party audit shall exist during the term of this Agreement and for a period for one year after the date of any termination or expiration of this Agreement. The parties shall mutually agree upon a third-party auditor. The auditor shall be subject to state, federal, and tribal law with regard to the confidentiality of taxpayer information.

8. Effective Date. This Agreement is effective on the date that the last party signs this agreement so long as the following conditions precedent are met: the Tribe has adopted and provided a copy to the State of an ordinance as required by Section 3 above; the Agreement has received the final approval of the Council; the Agreement has been approved by the State Attorney General, as required by § 18-11-105, MCA; and a public hearing, as required by § 18-11-103, MCA, has been held and comments received and considered. The State may defer distribution of any funds to the Tribe under Section 5 until the above-described tribal ordinance is enacted by the Tribe and approved by the Northern Cheyenne Agency, Bureau of Indian Affairs, United States Department of Interior.

9. Amendments and Renewal.

a. This Agreement may be amended only by written instrument signed by both parties.

b. Six months prior to expiration of the initial term provided in this Agreement, the parties shall meet to negotiate in good faith a renewal of the Agreement for an additional ten year term, and thereafter shall meet to negotiate successive ten year renewals of the Agreement. The parties in each negotiation of a renewal term shall seek to agree on a distribution of tax revenues on substantially the same basis as the one provided above, in light of the circumstances existing at that time. If the parties do not meet prior to the expiration of a term of this Agreement, the Agreement shall be deemed to be effective for an additional ten year term.

10. Termination.

a. Either Party may terminate this Agreement, for any reason, with or without cause, at the end of any quarter with 30-days written notice of termination to the other party.

b. The Northern Cheyenne – Montana Agreement on Distribution of Untaxed Cigarettes within the Exterior Boundaries of the Northern Cheyenne Reservation, dated December 22, 1992, terminates on the effective date of this Agreement. This Agreement prospectively replaces all tobacco agreements entered into between these parties prior to the effective date of this agreement.

11. Jurisdiction and Venue. The parties agree and stipulate that venue and jurisdiction for enforcement of the terms hereof lie in a Montana state district court. Appropriate relief shall be limited to monetary judgment against the breaching party, including costs and attorney fees, arising from the breach, and such other relief as is

necessary to put the non-breaching party in the same position they would have been in had the breaching party performed in accordance with the agreement. The failure to pursue a remedy for one or more breaches is not a waiver of any right to remedy a subsequent breach of the same or a different term herein.

12. Mutual Limited Waiver of Sovereign Immunity. The State has waived its sovereign immunity from suit for contract actions arising under the Agreement, see, Title 18, chapter 1, part 4, Montana Code Annotated, and for tort actions, see Title 2, chapter 9, part 1, Montana Code Annotated. The Tribe expressly grants a limited waiver of sovereign immunity from suit for litigation pertaining to this Agreement, provided that the Tribe's waiver shall be no more extensive than the State's waiver pursuant to Title 18, chapter 1, part 4, Montana Code Annotated, and Title 2, chapter 9, part 1, Montana Code Annotated, and shall only extend to the State and no other parties. Neither party waives its sovereign immunity except as provided in this Agreement.

13. Reservation of Rights and Negative Declaration. The State and Tribe have entered into this Agreement in part to resolve any potential legal disputes between them regarding tobacco taxation and avoid litigation. The parties agree that by entering into this Agreement, neither the State nor the Tribe shall be deemed to have waived any rights, arguments, or defenses available in litigation on any subject except as specifically provided in this Agreement. This Agreement is specifically not intended to reflect or be viewed as reflecting in this or any context either party's position with respect to the jurisdictional authority of the other. Nothing in this Agreement or in any conduct undertaken pursuant thereto shall be deemed as enlarging or diminishing the jurisdictional authority of either party. This Agreement may be introduced into evidence in any proceeding involving this Agreement. Neither this Agreement, nor conduct pursuant

thereto or in the negotiations or renegotiations of this Agreement, shall be offered as evidence, otherwise referred to in any present or future litigation, or used in any way to further either party's equitable or legal position in any litigation except to the extent such introduction is permitted by the parol evidence rule in litigation seeking to enforce this Agreement. By entering into this Agreement, neither the State nor the Tribe is forfeiting any legal rights to apply their respective taxes except as specifically set forth in this Agreement. Without limitation, the Tribe's entry into this Agreement shall not be construed or contended as constituting tribal consent or acquiescence to the applicability of any provision of Title 16, chapter 11, Montana Code Annotated, to activities on the Northern Cheyenne Reservation, except to the extent, if any, that the State otherwise possesses lawful jurisdiction over such activities. This Agreement does not apply to any state tax collected other than the tax on tobacco as provided in §§ 16-11-101 through -206, MCA. It does not apply to any other taxes or fees of any nature collected by the State, the Tribe or any of their respective agencies or subdivisions.

14. Notices. All notices and other communications required to be given under this Agreement by the Tribe and the State shall be deemed to have been duly given when delivered in person or posted by United States certified mail, return receipt requested, with postage prepaid, addressed as follows:

- i. To the Tribe:
President
Northern Cheyenne Tribe
PO Box 128
Lame Deer, MT 59043

With Copies to:
Treasurer
Northern Cheyenne Tribe
PO Box 128
Lame Deer, MT 59043

Steven H. Chestnut, Tribal Attorney
Ziontz, Chestnut, Varnell, Berley & Slonim
2101 4th Avenue, Ste. 1230
Seattle, Washington 98121

ii. To the State:
Governor's Office
PO Box 200801
State Capitol
Helena, MT 59620-0801

With Copies to:
Director of Revenue
Department of Revenue
Room, 455, Mitchell Building
Helena, Montana 59620

Attorney General
215 North Sanders
Helena, MT 59620-1401

Notice shall be considered given on the date of mailing.

This Contract consists of ten pages.

DATED this ____ day of _____, 2011.

STATE OF MONTANA

NORTHERN CHEYENNE TRIBE of the
NORTHERN CHEYENNE RESERVATION

Brian Schweitzer Date
Governor

Leroy, Spang, President Date

(pursuant to authorizing resolution of the
Northern Cheyenne Tribal Council)

Dan Bucks Date
Director of Revenue

Approved pursuant to § 18-11-105, MCA:

Steve Bullock Date
Attorney General

Exhibit A

STATE OF MONTANA }
 : ss
County of _____ }

FORM OF AFFIDAVIT

1. I am the Director of the Enrollment Office of the Northern Cheyenne Tribe ("Tribal Enrollment Director") responsible for maintaining the record of enrolled tribal members for the Northern Cheyenne Tribe of the Northern Cheyenne Reservation.
2. I have been the Tribal Enrollment Director for the Northern Cheyenne Tribe since _____.
3. In my capacity as Tribal Enrollment Director, I am responsible for maintaining and continually updating the record of those Northern Cheyenne tribal members living on the Reservation, off the Reservation, and immediately adjacent to the Reservation.
4. These records are maintained for a variety of purposes, including registration for tribal elections, state/tribal revenue sharing agreements, and the distribution of treaty monies and other payments to tribal members.
5. On _____, I reviewed the tribal records concerning the enrolled Northern Cheyenne tribal members currently residing on the Northern Cheyenne Reservation.
6. Based on my experience and expertise as Tribal Enrollment Director, and based upon the records at my disposal, I conclude that there are _____ enrolled Northern Cheyenne tribal members currently residing on the Northern Cheyenne Reservation.

I, _____, have read the foregoing affidavit and know the contents thereof, and state that the facts and matters contained therein are true, accurate, and complete to the best of my knowledge, information, and belief, subject to penalties for perjury and false swearing.

DATED this _____ day of (month), 2011.

By: _____
Affiant

SUBSCRIBED AND SWORN to me this _____ day of
(month), 2011.

Notary Public for the State of Montana

printed name of notary

Residing at: _____

My commission expires: _____

Exhibit B

STATE OF MONTANA }
 : ss
County of Rosebud }

AFFIDAVIT

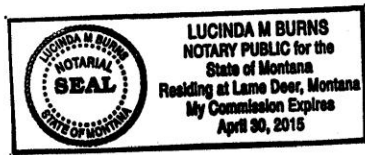
1. I am the Director of the Enrollment Office of the Northern Cheyenne Tribe ("Tribal Enrollment Director") responsible for maintaining the record of enrolled tribal members for the Northern Cheyenne Tribe of the Northern Cheyenne Reservation.
2. I have been the Tribal Enrollment Director for the Northern Cheyenne Tribe since 2005.
3. In my capacity as Tribal Enrollment Director, I am responsible for maintaining and continually updating the record of those Northern Cheyenne tribal members living on the Reservation, off the Reservation, and immediately adjacent to the Reservation.
4. These records are maintained for a variety of purposes, including registration for tribal elections, state/tribal revenue sharing agreements, and the distribution of treaty monies and other payments to tribal members.
5. On August 12, 2011, I reviewed the tribal records concerning the enrolled Northern Cheyenne tribal members currently residing on the Northern Cheyenne Reservation.
6. Based on my experience and expertise as Tribal Enrollment Director, and based upon the records at my disposal, I conclude that there are 4,862 enrolled Northern Cheyenne tribal members currently residing on the Northern Cheyenne Reservation.

I, Wallace Bearchum, have read the foregoing affidavit and know the contents thereof, and state that the facts and matters contained therein are true, accurate, and complete to the best of my knowledge, information, and belief, subject to penalties for perjury and false swearing.

DATED this 12th day of August, 2011.

By: 
Affiant

SUBSCRIBED AND SWORN to me this 12 day of August, 2011.



Lucinda M. Burns
Notary Public for the State of Montana

Lucinda M. Burns
PRINTED NAME OF NOTARY

Residing at: Lame Deer, Montana

My commission expires: April 30, 2015